

THE FRIENDS AND RESIDENTS OF LOG CREEK
KALAPOOYA SACRED CIRCLE ALLIANCE, INC.

IBLA 97-428

Decided August 9, 1999

Appeals from a decision and finding of no significant environmental impact issued by the Area Manager, McKenzie Resource Area (Oregon), Bureau of Land Management, restoring and maintaining McGowan Meadow to prevent further damage. OR-090-97-22.

Dismissed in part, affirmed in part.

1. Appeals: Generally--Rules of Practice: Appeals:
Standing to Appeal--Rules of Practice: Appeals:
Dismissal

To establish standing to appeal under 43 C.F.R. ' 4.410, the appellant must show that it is a party to the case and that it has a legally cognizable interest that has been adversely affected by the decision appealed. When an appellant has not participated before BLM during BLM's consideration of the decision on appeal, the appellant is not a party to the case, and the appeal properly is dismissed.

2. Appeals: Generally--Practice Before the Department:
Persons Qualified to Practice--Rules of Practice:
Appeals: Dismissal

Practice before the Interior Board of Land Appeals is controlled by 43 C.F.R. ' 1.3. To the extent an appeal is brought by a person who does not fall within any of the categories of persons authorized to practice, an appeal is subject to dismissal.

3. Appeals: Generally--Rules of Practice: Appeals:
Dismissal--Rules of Practice: Appeals: Statement of
Reasons

An appeal is subject to summary dismissal if a statement of reasons in support of the appeal is not included in the notice of appeal and is not filed

within 30 days after the filing of a notice of appeal.

However, the Board of Land Appeals will avoid procedural dismissals when there has been no showing that the delay in filing the statement of reasons prejudiced the adverse party.

4. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

A decision on a proposed action and its finding of no significant impact determination will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. A party challenging the determination must show that it was premised on a clear error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party, and mere differences of opinion provide no basis for reversal.

APPEARANCES: Pam Hewitt, The Friends and Residents of Log Creek, Marcola, Oregon; Carol Logan, Kalapooya Sacred Circle Alliance, Inc., Springfield, Oregon; Emily Rice, Area Manager, McKenzie Resource Area, Bureau of Land Management, Eugene, Oregon.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Friends and Residents of Log Creek (Friends and Residents) and The Kalapooya Sacred Circle Alliance, Inc. (Sacred Circle), have jointly appealed an April 22, 1997, decision and finding of no significant impact (FONSI) issued by the Area Manager, McKenzie Resource Area (Oregon), Bureau of Land Management (BLM), proposing to restore and maintain approximately 4 acres of McGowan Meadow, situated in sec. 13, T. 16 S., R. 3 W., Willamette Meridian. The stated purpose of the action was "to prevent further damage and restore native plant communities to conditions closer to predisturbance conditions." (Decision at 1.) BLM proposed to implement these objectives by actions designed to: "[P]revent future access by OHV [Off-Highway Vehicle] use[,], restore the plant community by reducing the number of exotic species, increasing native species and reducing encroachment of conifers[, and] maintain and restore those hydrologic processes necessary to maintain the desire wetland plant community." Id.

McGowan Meadow was deemed to be "a fragile and unique plant community with several unusual species, known to the community as a good wildflower viewing area, which has had OHV damage and associated invasion of exotic species and erosion." (Jan. 10, 1997, Memorandum.) An environmental

assessment for the project, designated as OR-090-97-22, was drafted and made available for public comment on March 25, 1997, and a notice of availability was published on March 26, 1997.

The Friends and Residents submitted a comment letter on April 10, 1997. In its comments the Friends and Residents complimented BLM's restoration proposal generally, but voiced a concern that "this project does not go far enough." (Friends and Residents Comment Letter at 1.) It then offered several recommendations it considered necessary to "deliver the maximum benefit." *Id.* at 2. Several other parties offered comments during the review period, but Sacred Circle was not among those who submitted comments.

On April 22, 1997, the McKenzie Resource Area Manager approved implementation of the proposed action in a Decision Record and Finding of No Significant Impact (Decision Record). The Manager found "that the Proposed Action will not have any significant environmental impacts not already addressed in the Eugene District RMP and POD." (Decision Record at 9.) She also noted that the proposed action "is tiered to the Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents within the Range of the Northern Spotted Owl, April 1994 and the Eugene District Record of Decision/Resource Management Plan (RMP), June 1995." (Decision Record at 2.) Copies of the decision and FONSI determination were mailed to interested parties, and a notice of the decision and findings was published on April 23, 1997.

On May 13, 1997, Carol Logan, who identified herself as a "Kalapooya Lineal Descendent," filed a request to meet with BLM on behalf of Sacred Circle to discuss the McGowan Meadow Restoration Project, its location within a "sacred site," and BLM's compliance with Presidential Executive Order No. 13007 regarding preservation of "sacred sites." ^{1/} A single notice of appeal signed by "Carol Logan, Practitioner" for Sacred Circle and by Pam Hewitt was filed on behalf of The Friends and Residents on May 21, 1997. A Statement of Reasons (SOR) was submitted on June 30, 1997.

[1] There are several procedural matters that must be addressed prior to addressing the merits of the appeal. The first involves the jurisdiction of the Board to review the Friends and Residents appeal and the Sacred Circle appeal which are appeals from two parties having divergent interests. The regulation at 43 U.S.C. ' 4.410(a) sets out two separate and distinct prerequisites to prosecution of an appeal by the Board of Land Appeals: (1) the appellant must be a "party to the case," and (2) the appellant must be "adversely affected" by the decision below. Greg Williams, 98 IBLA 303, 305 (1987). The principal means by which a

^{1/} There is no evidence that any meeting took place until May 28, 1997, which was after the appeal had been filed.

person becomes a "party to a case" within the meaning of section 4.410(a) is to actively participate in the decision making process which leads to the appeal. See National Park Service, 118 IBLA 204 (1991) (Government agency responsible for administration is a party to the case); Edwin H. Marston, 103 IBLA 40 (1988). Sacred Circle did not participate in the decision making process and is not a party to this case. In California Association of Four Wheel Drive Clubs, 30 IBLA 383, 385 (1977), we stated:

The purpose of the requirement that an individual be a "party to a case" before a notice of appeal to this Board will lie is not to limit the rights of those who disagree with Bureau actions, but to afford a framework by which decision making at the departmental and State Office level may be intelligently made.

If an individual has been a "party to a case" and seeks review of the Bureau's actions, it is presumed that the Bureau had the benefit of that individual's input when the original decision was made; thus the BLM was fully aware of the adverse consequences that might be visited upon such an individual as a result of its actions.

Edwin H. Marston, *supra* at 42; see also Utah Wilderness Association, 91 IBLA 124, 129 (1986). The purpose of limiting standing to appeal in this manner is to afford an intelligent framework for administrative decision making, based on the assumption that BLM will have had the benefit of the input of an appellant when reaching the initial decision. Sacred Circle's appeal poses this problem, as its concerns had not been presented to BLM before the decision on appeal was rendered. 2/ As Sacred Circle did not seek to become involved until after BLM had issued its decision it has no standing to appeal and its appeal must be dismissed. 3/

[2] A single SOR has been received. It was signed by Carol Logan for Sacred Circle and Pam Hewitt for The Friends and Residents of Log Creek. Practice before the Board of Land Appeals is controlled by 43 C.F.R. ' 1.3. A person filing an appeal is responsible for showing he or she is qualified to practice within the scope of the regulations.

2/ Had we considered the portion of the appeal documents attributed to Sacred Circle, we most likely would have deferred to the general principle that arguments presented before the Board but not before the agency whose decision is being appealed are subject to dismissal. E.g., Blackhawk Coal Co., 104 IBLA 169 (1988); see also Henry A. Alker, 62 IBLA 211 (1982).

3/ We note that if Logan's May 13, 1997, filing is considered to be a protest, it was not timely and therefore could not elevate Sacred Circle to the status of party. See Willamette Logging Communications, 86 IBLA 77 (1985).

Robert A. Perkins, 119 IBLA 375, 382 (1991). If a person other than an attorney intends to represent more than one party, there must be an affirmative showing that the representative of one appellant is qualified and authorized to represent other appellants. The Wilderness Society, 109 IBLA 175, 176-77 (1989). The record indicates that Hewitt is one of several people who united as The Friends and Residents of Log Creek to voice their mutual concerns, but does not indicate a relationship between Hewitt and the others which qualifies her to represent them before the Department. However, she is entitled to appeal on her own behalf and her appeal is accepted.

[3] The SOR was due on June 20, 1997, but was not received until June 30, 1997. 4/ The applicable regulation, 43 C.F.R. 4.402, provides that failure to file an SOR within required time makes the appeal subject to summary dismissal. However, this Board avoids procedural dismissals when there has been no showing that the delay in filing the SOR prejudiced the adverse party. James C. Mackey, 114 IBLA 308, 312-13 (1990). BLM has responded to the tardiness of the filing, not to allege prejudice but to request a commensurate extension for filing an answer. We find no reason to dismiss the appeal for failure to file the SOR in a timely manner.

In her SOR, Hewitt asserts that the individuals comprising Friends and Residents use "the planning area" for various outdoor uses. We interpret this to mean that she includes herself as one who uses the area, and she therefore meets the test of standing. See The Wilderness Society, 110 IBLA 67, 70-71 (1989). Accordingly, we will review those arguments in the SOR made by Hewitt (as a member of The Friends and Residents of Log Creek). 5/

Hewitt states that Friends and Residents opposes only that part of BLM's decision which proposes "to plant a shrub screen and the permanent placement of boulders in the middle of the meadow." (SOR at 2.) She does not oppose BLM's proposals to repair off-road vehicle ruts and to remove encroaching young conifers. She also seeks "remedy on related issues that have bearing on this specific project, including a requirement that the Eugene District BLM engage in consolidated land use management planning within the Mohawk River Watershed * * *." (SOR at 2.)

4/ Departmental regulation 43 C.F.R. ' 4.401(a) allows a 10-day grace period, provided the document was transmitted within the period allowed. It does not appear, however, that the document was transmitted on or before June 20.

5/ As Hewitt alone has standing to appeal, we need not resolve whether the remaining members of The Friends and Residents of Log Creek have standing or may be represented by her. For convenience, we will continue to refer to The Friends and Residents of Log Creek or Appellants in the plural but this is not to be construed that we have conclusively determined that they have standing.

In its answer, BLM responds to what it identifies as 27 issues raised in the SOR. Most of the issues are outside the scope of the project or not applicable to the issued decision. BLM notes that the other issues (issues numbered 1, 3, 11, 12, 14, 15, 21, 24, 25, and 26 in BLM's Answer) were addressed in the EA process.

[4] The general standard for review of a BLM decision based on an environmental assessment of the proposed action is whether the record establishes that BLM took a "hard look" at the environmental consequences of the action, identified the relevant areas of environmental concern, made a reasonable finding that the impacts studied are insignificant, and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance. Oregon Natural Resources Council, 131 IBLA 180, 186 (1994). A party challenging a FONSI determination and a decision to proceed with the proposed action must show that the determination and decision were premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. See, e.g., Committee for Idaho's High Desert, 137 IBLA 92 (1996); Powder River Basin Resource Council, 124 IBLA 83 (1992). The FONSI determination and decision will be affirmed on appeal if they are based on a consideration of all relevant factors and supported by the record, including an EA which establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of environmental analysis. Mere differences of opinion provide no basis for reversing BLM's decision when the decision is reasonable and supported by the record on appeal. Sierra Club, Toiyabe Chapter, 131 IBLA 342, 345 (1994); Southern Utah Wilderness Alliance, 127 IBLA 331, 100 I.D. 370 (1993).

Appellants' challenge is based on their perception that BLM's action is not exhaustive enough. However, BLM's management objectives for this project do not encompass the additional measures suggested. The proposed activities are based on "the need to reduce further damage to the meadow and to restoring the native plant communities." (Decision at 2.) The record demonstrates that BLM took a hard look at the environmental impacts of the proposed action. Its decision was reasonable in light of the data it collected and the input received. Appellants have not shown that the decision is incorrect or violates any relevant law or guideline. We further find from our review of the case file that BLM has made a convincing case for its proposed action and must affirm its decision. See Susan J. Doyle, 138 IBLA 324 (1997).

To the extent not expressly or impliedly addressed in this decision, all other errors of fact or law alleged by appellants have been considered and are rejected. See National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954); Glacier-Two Medicine Alliance, 88 IBLA 133, 156 (1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. ' 4.1, the decision appealed from is affirmed.

R.W. Mullen
Administrative Judge

I concur:

James P. Terry
Administrative Judge